

SUNKAM HENG

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
DATO' EDGAR JOSEPH JR., TAN SRI DATO'
HJ. MOHD. AZMI B. DATO' HJ.
KAMARUDDIN, DATO' PEH SWEE
CHIN SCJ
[CRIMINAL APPEAL NO: 05-123-89]
19 NOVEMBER 1992

CRIMINAL LAW: *Firearms - Ammunition - Illegal possession - Charged under s. 57(1)(a) & (b) of Internal Security Act 1960 - Found guilty - Section 57(1) of Internal Security Act 1960 - Sentenced to death - Appeal to Supreme Court.*

CRIMINAL PROCEDURE: *Convictions challenged solely on one ground - Whether the firearm and ammunition were the ones that was snatched from the hand of the appellant on the date, time and place referred to in the charges - Burden of proof on prosecution - Standard of proof - Beyond reasonable doubt - Failure of the prosecution to discharge the burden and standard of proof - Guilt of the appellant - Whether the principle involved that the prosecution had to prove the ingredients of the charge beyond reasonable doubt entitled the appellant to an acquittal despite clear evidence as to his guilt.*

The appellant was found guilty and subsequently sentenced to death by the Kuala Lumpur High Court of the following two charges:

- (1) Illegal possession of a firearm which had no serial number in contravention of s. 57(1)(a) of the Internal Security Act 1960 ("the Act"); and
- (2) Illegal possession of one round of ammunition in contravention of s. 57(1)(b).

Both the charges were punishable with mandatory death sentence under s. 57(1) of the Act. He appealed to the Supreme Court solely on the issue whether the subject matter of the charges viz. the firearm (Ex P3) described as the revolver and the ammunition (P9B) in it were the ones that were seized from him on the date, time and place referred to in the charges.

On 18 January 1987, the appellant was caught within minutes after robbing the victim. He was positively identified by prosecution witnesses, one of whom was the victim himself. However, there was conflicting evidence by the prosecu-

a tion witnesses as to whether the firearm which was snatched from the hand of the appellant was a "revolver" or a "pistol", as well as to the identity of the policeman who had actually snatched the weapon from the hand of the appellant.

b Further, the defence contended that police had failed to make any identification mark on the weapon nor was it kept in a sealed envelope with the appropriate endorsement authenticating the seizure, despite the fact that the weapon bore no serial number.

c The crucial point of appeal was whether the convictions were vitiated by the failure of the prosecution to explain the whereabouts of the weapon during the three crucial days between 18 January 1987 when the weapon was snatched from the appellant and 21 January 1987 when it was sent to Armourer ASP Haji Ishak for examination and report.

d The prosecution claimed that during the intervening three days it was kept in the safe of the superior of ASP Haji Ishak, one DSP Bahadom. However, he was neither called to testify nor offered to the defence.

e At the trial as well as at the appeal proceedings, the defence attacked this alleged break in the chain of evidence.

Held:

f [1] There was a gap in the case for the prosecution regarding the retention of the weapon described as a revolver snatched from the hand of the Appellant during the crucial three days when it was allegedly lying in the safe of DSP Bahadom.

g [2] That being so, the entire testimony of the Armourer and the Report of the Chemist which was directed towards establishing that the revolver and the ammunition in it, being Exhibits P3 and P9B, came within the expressions "firearm" and "ammunition", respectively as defined in s. 2 of the Act would have to be disregarded as irrelevant to the charges.

h [3] In the particular circumstances of this case, without the testimony of the Armourer and the Report of the Chemist, there was insufficient evidence that what had been snatched from the hand of the Appellant came within the expressions "firearm" and "ammunition" as defined in s. 2 of the Act.

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[4] There was nothing in the Grounds of Judgment of the learned Trial Judge indicating that he had directed his attention to the infirmities aforesaid in the case for the prosecution.

[5] Accordingly, although it was utterly regrettable that the Appellant should succeed in his appeal, the principle involved was more important than the case itself, and so, with considerable regret, the Court had no option but to allow the appeal, quash the convictions, set aside the sentences and record orders of acquittal and discharge.

[Appeal allowed, convictions quashed, sentences set aside and appellant acquitted and discharged].

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG JENAYAH: Senjata api - Amunisi - Milikan menyalahi undang-undang - Dipertuduhkan di bawah s. 57(1)(a) & (b) Keselamatan Dalam Negeri 1960 - Dijatuhkan hukuman mati - Rayuan kepada Mahkamah Agung.

PROSEDUR JENAYAH: Kesabitan dicabar semata-mata atas satu alasan - Sama ada senjata api dan amunisi tersebut merupakan yang dirampas dari tangan perayu pada tarikh, masa dan tempat yang disebutkan dalam pertuduhan - Beban membuktikan atas pendakwa - Standard bukti - Di luar keraguan munasabah - Kegagalan pendakwa untuk menolak beban dan standard bukti - Kebersalahan perayu - Sama ada prinsip yang terlibat bahawa pendakwa mestilah membuktikan kandungan pertuduhan di luar keraguan munasabah membolehkan perayu dibebaskan walaupun terdapat bukti yang jelas mengenai kebersalahannya.

Perayu telah dipertuduhkan dan didapati bersalah lalu dijatuhkan hukuman mati oleh Mahkamah Tinggi Kuala Lumpur atas dua pertuduhan berikut:

- (i) Milikan menyalahi undang-undang akan sebuah senjata api yang tidak mempunyai sebarang nombor siri yang melanggar s. 57(1)(a) Akta Keselamatan Dalam Negeri 1960 ("Akta tersebut") dan
- (ii) Milikan menyalahi undang-undang akan sebutir amunisi yang melanggar s. 57(1)(b).

Kedua-dua pertuduhan tersebut boleh dijatuhkan hukuman mandatori di bawah s. 57(1) Akta tersebut. Beliau merayu kepada Mahkamah Agung atas isu sama ada hal perkara pertuduhan

a tersebut iaitu senjata api (Ex P3) yang diperihalkan sebagai revolver dan peluru (P9B) di dalamnya itu merupakan yang dirampas dari perayu pada tarikh, masa dan tempat yang disebutkan dalam pertuduhan.

b Pada 18 Januari 1987, perayu telah ditangkap sejurus selepas merompak mangsanya. Beliau telah dikenalpasti dengan positif oleh saksi-saksi pendakwa, di mana salah seorang darinya ialah mangsa itu sendiri.

c Walau bagaimanapun terdapat keterangan yang bercanggah yang diberikan oleh saksi-saksi pendakwa mengenai sama ada senjata api yang dirampas dari tangan perayu merupakan sebuah "revolver" atau sebuah "pistol", dan juga mengenalpasti anggota polis yang sebenarnya merampas senjata tersebut dari tangan perayu.

d Selanjutnya, pihak pembela menghujahkan bahawa polis telah gagal untuk membuat sebarang tanda pengenalan pada senjata tersebut ataupun menyimpannya dalam sampul yang dimeteri dengan tanda yang sepatutnya yang mengesahkan rampasan tersebut walaupun pada hakikatnya senjata itu tidak mempunyai sebarang nombor siri.

e Fakta rayuan yang penting ialah sama ada kesabitan kesalahan menjadi terbatal atas kegagalan pendakwa untuk menerangkan mengenai perletakan senjata tersebut sepanjang tiga hari yang penting iaitu antara 18 Januari 1987 apabila senjata tersebut dirampas dari perayu dan 21 Januari 1987 apabila ia dihantar kepada Amira PPP Haji Ishak untuk pemeriksaan dan laporan.

f Pendakwa menyatakan bahawa sepanjang tiga hari tersebut senjata itu disimpan dalam simpanan pegawai atasan PPP Haji Ishak iaitu TPP Bahadom. Akan tetapi, beliau tidak dipanggil untuk memberi keterangan ataupun dikemukakan kepada pihak pembela.

g Pihak pembela menghujahkan mengenai kepecahan rantai keterangan ini diperbincangkan dan juga semasa prosiding rayuan.

h **Diputuskan:**

i [1] Terdapat lompang dalam kes pendakwa berhubung dengan penyimpanan senjata yang diperihalkan sebagai sebuah revolver yang dirampas dari tangan perayu sepanjang tiga hari yang penting itu di mana ia dikatakan berada dalam simpanan TPP Bahadom.

[2] Oleh yang demikian, keseluruhan testimoni Amra dan laporan ahli kimia yang membuktikan bahawa revolver dan peluru di dalamnya itu, iaitu Eksibit P8 dan P9B adalah tergolong dalam tafsiran "senjata api" dan "amunisi" masing-masing sebagaimana yang dinyatakan dalam s. 2 Akta tersebut terpaksa- lah diketepikan sebagai tidak relevan kepada pertuduhan tersebut.

[3] Dalam kes ini, tanpa testimoni Amra dan Laporan Ahli Kimia, tiada keterangan yang secukupnya mengenai apa yang telah dirampas dari tangan perayu tergolong dalam pernyataan "senjata api" dan "amunisi" sebagaimana yang dinyatakan dalam s. 2 Akta tersebut.

[4] Tiada apa-apa dalam alasan-alasan penghakiman oleh Hakim Perbicaraan yang bijak-sana tersebut yang menunjukkan bahawa beliau telah memberi perhatian kepada kekurangan-kekurangan yang tersebut di atas dalam kes pendakwa.

[5] Walaupun adalah mendukacitakan sekali bahawa perayu berjaya dalam rayuannya, prinsip yang terlibat adalah lebih penting daripada kes itu sendiri, dan oleh itu, dengan penuh kesal, Mahkamah tidak mempunyai pilihan selain daripada membenarkan rayuan tersebut, membatalkan kesabitan kesalahan mengenepikan hukuman dan merekodkan perintah untuk pelepasan dan pembebasan.

[Rayuan dibenarkan, kesabitan kesalahan dibatalkan, kesalahan diketepikan dan perayu dibebaskan dan dilepaskan].

Legislation referred to:

Internal Security Act 1960 (Revised 1972), ss. 2, 57(1)(a) & (b)

For the appellant - Gurbachan Singh; M/s. Bachan & Kartar

For the respondent - Suriyadi bin Halim Omar, DPP.

JUDGMENT

Edgar Joseph Jr. SCJ:

This appellant was prosecuted in the High Court of the Federal Territory upon the following two charges:

1st Charge:

That you on 18 January 1987 at about 12.40 p.m. at Jalan Sultan Abdul Samad, Brickfields, in the City of Kuala Lumpur, in the Federal Territory, being a security area as proclaimed by the Yang Di Pertuan Agong *vide* P.U.(A) 148 dated 15 May 1969, without lawful excuse

a and lawful authority did have in your possession a firearm, to wit, one .38 Smith and Wesson Special (Model 36) without serial numbers and that you have thereby contravened s. 57(1)(a) of the Internal Security Act 1960 (Revised 1972) and punishable under s. 57(1) of the said Act.

b 2nd Charge:

c That you on 18 January 1987 at about 12.40 p.m. at Jalan Sultan Abdul Samad, Brickfields, in the city of Kuala Lumpur, in the Federal Territory, being a security area as proclaimed by the Yang Di Pertuan Agong *vide* P.U.(A) 148 dated 15 May 1969 without lawful excuse and without lawful authority did have in your possession one round of .38 special ammunition and that you have thereby contravened s. 57(1)(b) of the Internal Security Act 1960 (Revised 1972) and punishable under s. 57(1) of the said Act.

d In the event, he was convicted of both the charges and sentenced to death, that being the mandatory sentence, prescribed by s. 57 (1) of the Internal Security Act 1960.

He then appealed against these convictions.

e Before us, the convictions were attacked solely on one ground, and that revolved around the critical question, whether it had been proved beyond reasonable doubt that the revolver (Ex. P3) and ammunition (P9B) produced in the court below, which constituted the subject matter of the first and second charges, respectively, were, what was snatched from the hand of the appellant on the date, and at the time and place referred to in the charges.

f Now, the whole of the material evidence in the case for the prosecution had been carefully and critically examined before us and we do not consider it necessary to recapitulate the evidence at length but, briefly, according to that evidence, the appellant was arrested within minutes after a robbery at gun point, the victim of the robbery being one Ong Chee Kew (PW1), who was set upon by the robber as he was about to open the door of his car parked just outside his home at Jalan Abdul Samad, in Brickfields, Kuala Lumpur, and relieved of his wrist watch, gold chain and wallet.

g Having snatched these personal effects, the robber took to his heels pursued by Ong who, by any standards, was a man of unusual courage and firmness. The robber was said to have fired three shots at Ong during the pursuit, one of which grazed his head. The robber then managed to stop

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a passing motor car, described as “a yellow car” - to get into it and again, at gun point, forced its driver, one Tan Chee Kean (PW2), to drive off.

Some 200 metres away, at Jalan Padang Belia, Brickfields, a fat male Malay - later identified as Constable Shamsuddin bin Setar (PW3) - who happened to be at the scene, (together with his superior Inspector Abdul Manan and Sergeant Manaf), having been alerted by some members of the public as to what was happening - drew his revolver and pointed it at Tan in an attempt to stop him, but understandably, Tan had no choice but to continue driving; as he did so, the robber shot once at Shamsuddin, but missed.

Inspector Abdul Manan then pursued the yellow car through Jalan Tun Sambanthan Tiga into Jalan Sambanthan, and then into Jalan Travers where, with the help of Police Constable Richards, who also happened to be at the scene riding his motor cycle, he managed to stop the yellow car.

According to Inspector Manan, Police Constable Richards then opened the driver's door of the yellow car, the driver Tan pointed to the robber who was in a stooping position in the rear seat, the latter then straightened up, and “pointed a **pistol**” at him. But, added Manan, “I then snatched the **pistol** from his hand”.

He then positively identified the appellant as the man from whom he said he had seized the pistol, and added:

I had examined the **revolver** which I seized from the Accused. It was a Smith and Wesson . 38, 3 inch barrel. There was no serial number on it ..., I found 4 empty shells and 1 bullet which had been fired but did not explode. On the same day, I handed over the exhibits I recovered to Inspector Stanley. He acknowledged the handing over by signing on the Receipt (P6).

Going back a little, the appellant was also positively identified by Ong as the person who had robbed him of his personal effects aforesaid.

We must now embark upon a consideration of the submissions advanced on behalf of the appellant.

Firstly, it was argued that Inspector Manan had first used the word “pistol” and then the word “revolver” - a horse of a different colour - when referring to what he had snatched from the hand of the appellant, so that his testimony was self-

a contradictory on an essential part of the case for the prosecution, but we did not place undue stress on the point and mention it only in passing, having regard to other far more important questions, which arose for our consideration, which we shall next be discussing.

b The appellant was on firmer ground when it was argued on his behalf that, neither Manan nor any of his colleagues with him, had made any mark on the weapon described as a revolver snatched from the appellant's hand; for example, a scratch mark, nor was it enclosed in a sealed envelope, with an appropriate endorsement thereon duly initialled or signed, authenticating the seizure.

c These omissions became significant, bearing in mind that the revolver produced in the court below bore no serial number and, what was more, there was a conflict of evidence as to who actually snatched the weapon described as a revolver from the hand of the appellant; Inspector Manan maintained that he did so but, according to the testimony of Tan, it was Richards, who having pulled the appellant out of the car tried to wrest it from the appellant's hand and, with the assistance of Sergeant Manaf and another man, succeeded in doing so.

e However, the real point in this appeal was that although it was the case for prosecution that the revolver which had been snatched from the appellant's hand on 18 January 1987, had been sent to the Armourer ASP Haji Ishak on 21 January 1987 for examination and report, and later to the Government Chemist, it had, during the intervening three days, that is to say, between 18 January 1987 and 21 January 1987, been lying in the safe of the superior of ASP Haji Ishak, a certain DSP Bahadom, yet the latter was neither called nor even offered by the prosecution to the defence though he was apparently available.

f Under cross examination by Counsel for the appellant in the court below, ASP Haji Ishak claimed that the only revolver kept in the safe of DSP Bahadom was P3, with the ammunition (P9B) in it, and that the key to the safe was held exclusively by DSP Bahadom. This claim by ASP Haji Ishak was virtually worthless as evidence being plainly hearsay, DSP Bahadom not having been called. It was not suggested that what was described as a revolver, which had been snatched from the hand of the appellant, had been enclosed in a sealed envelope, when placed in the safe nor

was the safe register produced to demonstrate to the Court beyond reasonable doubt what, if anything else, the safe contained during the crucial three days.

It is true that the revolver, P3, and ammunition in it, being the four empty casings (P9A) and one round of .38 ammunition which had misfired (P9B), were enclosed in two separate envelopes, being P4 and P9, respectively, which were sealed by the Investigating Officer - Inspector Stanley Ringgit (PW6) - and sent to the Armourer ASP Haji Ishak for test firing but these acts of enclosing, sealing and sending occurred on 21 January 1987, that is to say, **after** the three crucial days.

Similarly, after test firing, Stanley Ringgit did receive these exhibits from the Armourer on 27 January 1987, in a sealed envelope, and later - on 5 February 1987 - had sent them to the Government Chemist in three sealed envelopes, also for test firing and eventually, on 22 August 1987, they were returned to him also in three sealed envelopes.

It follows, therefore that all this evidence regarding the movements of the revolver (P3), and the ammunition (P9B), was when they were on their way to the armourer and the chemist, and then back to the investigating officer and does nothing to repair the gap in the case for the prosecution, regarding the whereabouts of the weapon described as a revolver, snatched from the hand of the appellant, during the crucial three days when it was allegedly lying in the safe of DSP Bahadom. We repeat, it was only this latter part of the evidence which came under heavy attack by the defence not only here but in the court below, as well, yet, as we have already noted, DSP Bahadom was neither called nor even offered by the prosecution nor any explanation vouchsafed either here or below for these glaring omissions.

Before us, therefore, the question of critical substance which arose for decision was whether the prosecution evidence regarding this part of the case could withstand the attack by Counsel for the appellant.

It goes without saying that the burden was upon the prosecution from beginning to end and from first to last to prove beyond reasonable doubt that the subject matter of the charges, being the revolver (P3) with the ammunition in it (P9B), which had been produced in the Court below was

a the very thing described as a revolver, which had been snatched from the hand of the appellant on the date and at the time and place mentioned in the charges.

b We would add that the entire expert testimony of the Armourer and the report of the Government Chemist had been directed towards establishing that the revolver and the ammunition in it, being Exhibits P3 and P9B, came within the expressions "firearm" and "ammunition", respectively, as defined in s. 2 of the Internal Security Act 1960, (Revised 1974).

c If, therefore, there was a break in the chain of evidence relating to the retention of what was described as a revolver, which had been snatched from the hand of the appellant, at any time **before** it was allegedly sent to the armourer; in particular, during the crucial three days when it was allegedly lying in the safe of DSP Bahadom, then the testimony of the armourer and the report of the Chemist would have to be disregarded as being irrelevant to the charges.

d In the particular circumstances of the present case, we consider that without the testimony of the Armourer and the report of the chemist, there would be insufficient evidence that what had been snatched from the hand of the appellant came within the expressions "firearm" and "ammunition" as defined in s. 2 of the Internal Security Act.

e Finally, we detect nothing in the grounds of judgment of the Learned Judge to indicate that he had directed his attention to the infirmities aforesaid in the case for the prosecution.

f For the reasons stated, although it was utterly regrettable that the appellant should succeed in his appeal, the principle involved was more important than the case itself, and so, with considerable regret, we had no option but to allow the appeal, quash the convictions, set aside the sentences and record orders of acquittal and discharge. The Public Prosecutor will, no doubt, exercise his own discretion as to what action he thinks fit to take.

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